

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE:.....23 March 2016.....
SIGNATURE:

CASE NO.: A416/2015

(14372/2015)

DATE: 24/3/2016

In the matter between:

ELIAS JACOBUS GELDENHUYS DE BEER

Applicant

and

THE STATE

Respondent

JUDGMENT

JANSEN J

- [1] This appeal relates to alleged procedural irregularities which occurred in the criminal proceedings before the regional magistrate, Mr Nel. Hence, the matter is a review of the said proceedings. The judgment in the proceedings was delivered on 19 September 2014.
- [2] The charges against Mr Elias Jacobus de Beer (“**Mr De Beer**”) were serious in nature. He was charged with two counts of rape of a minor on or about 26 December 2010 and one of sexual assault; during or about June 2011. Mr De Beer was the boyfriend of the minor’s mother.
- [3] Mr De Beer pleaded not guilty on all counts.
- [4] Mr de Beer tendered a plea explanation in terms of section 15 of the Criminal Procedure Act 51 of 1977 and was duly informed of the provisions of sections 51, 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, as well as sections 92(2), 94, 256 and 281 of the Criminal Procedure Act 51 of 1977.
- [5] In his plea explanation, he stated that regarding the alleged rape on or about 25 December 2010 and 26 December 2010, a certain Susan, his brother and his sister could testify that the minor was not home and that she only arrived late during the afternoon on 26 December 2010 and that regarding what he referred to as the “third rape”, he worked for Katsweng Trading at the Tswaneng Mine, loading construction

material and that on the day in question he was in Zeerust in order to obtain “cross border” documentation. He stated that he was in Botswana the next day and could prove it by way of his passport. No dates were mentioned.

[6] Some of the language that he used in his plea explanation evidenced a denigratory attitude towards the minor and contained inappropriate language. He stated that he and K. (the minor’s mother) had sorted out their differences and that he told her that the minor was “... ’n orige meisiekind wie se parra haar pla”. The court commented on this wording, stating that the terminology used was wholly inappropriate. The court *a quo* should have gone further and should have reprimanded the legal representative and should have insisted on a proper plea explanation. The court *a quo* failed to fulfil its constitutional duty towards the appellant to ensure a fair trial, even in circumstances where the appellant was legally represented.

[7] It bears mention that under cross-examination Mr De Beer made the following admission: “*So as sy sê dat sy vroeg in die oggendure van Kersfeesoggend daar by die huis was is dit waar. Dit is reg ja.*”

[8] The minor’s mother testified that although they were not home the whole of the 25th of December 2010, they did return home that evening. (She further testified that she and the minor went home late on Christmas evening, 25 December 2010, and that they fetched Mr De Beer from a bar in Strydfontein. The mother’s testimony was that he was very inebriated). The minor also testified that although she was absent for part of the day, she returned home on the 25th of December 2010. Mr De Beer proffered a version that the minor had left on the 25th of December 2010 to visit a friend and only returned at 9h00 on the 26th of December 2010.

[9] According to Mr De Beer, the minor's mother, his parents, his sister and her husband and his brother were present when the mother confronted the minor about being out for the whole night of 25 December 2010. However, this version was never put to the minor. When asked why it had not been put to her, Mr De Beer answered: "*Nee niemand het gevra nie, so ek het nie.*"

[10] During cross-examination, Mr De Beer made the following admissions, on which the State relied in this application: —

QUESTION

"Toe julle opstaan daardie oggend het A. wakker geword in die huis en saam met julle soontoegegaan?"

ANTWOORD

"Dit is reg ja, sy was in die huis."

QUESTION

"So as sy sê dat sy vroeg in die oggendure van Kersfees oggend daar by die huis was is dit waar?"

ANSWER

"Dit is reg ja."

- [11] These questions relate to the morning of the 25th of December 2010 however, and take the matter no further. What is relevant is what happened during the night of the 25th of December 2010 and on the 26th of December 2010.
- [12] Furthermore, according to the charges against Mr De Beer, the two incidents of rape occurred on or about June 2011 and on or about 26 December 2010. According to the testimony which was led in the court *a quo* the two incidents of rape apparently occurred in the early hours of 26 December 2010. It is unclear why there was a deviation from the charge sheet in evidence or why the charges were not amended.
- [13] What also emerged from Mr De Beer's own evidence was that although he worked in Botswana in June 2011, he was home over weekends.
- [14] Furthermore, what is also significant is how much emphasis Mr De Beer placed on the minor exiting the bathroom with a towel wrapped around her, or wearing T-shirts with no bra. According to him, she developed quickly. This fascination (if one can call it that) with the minor's body is troublesome. According to Mr De Beer, the minor's conduct was inappropriate. Given the fact that there was apparently nobody else present, Mr De Beer's fascination with her body borders on the macabre. The minor was just a little girl when the rapes occurred as she was born on .. August 1998.
- [15] In his notice of motion, the relief which Mr De Beer seeks is that his convictions on the three counts mentioned be set aside and that the matter be referred back to the court *a quo* for such applications and evidence which he or the State may wish to make or lead.

[16] His application is based on the fact that, as was stated in his plea explanation, the minor was not home on the 25th of December 2010.

[17] According to his founding affidavit, his attorney Mr Dawid Nel, was fully aware of the fact that he had witnesses to corroborate his version, namely his mother, his brother Willem, his sister and her husband who could testify that the minor left their company at 14h00 on the 25th of December and only returned home at about 10h00/11h00 on the 26th of December 2010. An enormous altercation allegedly ensued between the minor and her mother as a result of the minor's disappearance for the night. As has been pointed out above, the version of an altercation was never put to the minor, nor her mother.

[18] According to Mr De Beer, his attorney consulted with his mother and his brother. His sister and her husband were also on standby to testify in his favour. Mr De Beer states that after he had testified, the matter was postponed and that when he asked his attorney when his witnesses would testify he was told by him: "*Dit is nou te laat – ons moes hulle alreeds geroep het*". His attorney alleged that Mr De Beer told him that he did not wish his witnesses to testify. Mr De Beer states that all that he had said was that his mother was elderly and if it could be avoided, he would not wish her to testify due to her age and health. Allegedly, Mr De Beer's attorney then told him that he no reason to worry that his witnesses had not been called and was informed: "*Jou saak lyk goed*".

[19] According to Mr De Beer, he did not have the money to obtain a new lawyer and was too ashamed to tell his new employer about the court proceedings. When found

guilty, however, his employer assisted him in obtaining a new lawyer who asked for the file of Mr Nel. There was no file as Mr Nel allegedly only kept notes. Neither were there receipts for the cash amounts that Mr Nel had obtained from Mr De Beer's mother and brother.

[20] Attorney Nel filed an answering affidavit in this application denying the allegations against him, stating that Mr De Beer seemed to be under the influence of dagga, was "jittery" and told him to finalise the matter as soon as possible. He also stated that the only time that he saw the mother and brother was early on in the proceedings when a bail application was launched. Mr Nel stated that Mr De Beer informed him that he could no longer afford his duties, whereupon he suggested to Mr De Beer to make use of the Legal Aid's services.

[21] In fact, attorney Nel alleges that he had informed Mr De Beer that the testimony of his mother and brother was of cardinal importance upon which Mr De Beer had allegedly informed him that he wished the matter to be completed as soon as possible.

[22] The prosecutor filed an affidavit stating that the evidence of the witnesses would take the matter no further as they were not present during the night of the 25th of December 2010 (at 2h00 or 3h00 – as testified by the minor and which evidence was never challenged). Furthermore, it was never put to the minor that she and her mother did not fetch Mr De Beer from a bar on the evening of 25 December 2010 nor that there was an altercation between them on the 26th of December 2010.

[23] On a conspectus of all the evidence put before the court, the following conclusions can be reached: —

[23.1] The nature of the “plea explanation” which attorney Nel prepared is shocking and extremely unprofessional.

[23.2] Attorney Nel places emphasis on his alleged entitlement to fees of R4000 per day and it cannot be ruled out that his failure to call further witnesses was because he knew that Mr De Beer had no further funds.

[23.3] The evidence of Mr De Beer’s witnesses might relate to what happened during the evening of the 25th of December 2010 and the morning and evening/night of the 26th of December 2010 even though Mr De Beer’s legal representative failed to put important versions to the State witnesses (which may very well be attributed to attorney Nel’s negligence).

[23.4] It was put to the minor that De Beer’s mother and sister would testify, as would Mr De Beer, that she did not return home the evening of the 25th of December 2010.

[23.5] Mr De Beer is entitled to a fair trial in terms of the Constitution of the Republic of SA, 1996. Regarding the count of rape at 02h00 or 03h00 on Christmas morning, Mr De Beer’s witnesses are in no position to assist him.

[23.6] Mr De Beer’s witnesses are, however, in no position to assist him regarding the count of sexual assault during or about June 2011.

[23.7] Mr De Beer's legal representative referred the court to the case of *S v Mafu 2008 (2) SACR 653 (W)* wherein it is pertinently held that a legal practitioner should act in the interests of his or her client. It was emphasised in that case that everything must be said that needs to be said and that all evidence that is justified, must be called. This principle was endorsed by the Supreme Court of Appeal in *S v Halgryn 2002 (2) SACR (SCA)*.

CONCLUSION:

[24] The conduct of Mr Nel in allowing a section 115 plea to be handed in, in the format in which it was, was patently inappropriate as was his attack on his erstwhile client in an endeavour to oppose this application coupled with the fact that he was without a case file and cash receipts. His conduct was unprofessional in the extreme.

[25] In the premises, the following order is proposed: —

Order

The applicant's conviction in respect of counts 1 and 2 in matter No. SH 190/2013 are set aside and the matter is referred back to the regional magistrate's court, Pretoria, in order to allow the applicant (and the respondent if it so wishes) to lead further evidence, or to make any applications which they wish.

MM JANSEN J

Judge of the High Court

I agree and it is so ordered.

KGANYAGO AJ

Judge of the High Court

For the Applicant: Advocate C.F.J. Brand SC

Instructed by André Grobler Attorneys (012 565 5593)

(Reference No. Mnr Grobler/LD0416)

For the Respondent: Advocate L Williams (084 294 8548)

Instructed by the Director of Public Prosecutions; 28 Church Street, Pretoria

(012 351 6700) (Ref No. D R Mahlalela)